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FILED
AUG 24 1998

No. 98-163

In The

Supreme Court of the United States

October Term, 1997

CITY OF IRVINE, CHIEF OF POLICE CHARLES S. BROBECK, OFFICER TROY GIELISH, OFFICER SHIRLEY SUMNER, OFFICER ROBERT LANDMAN, CALIFORNIA FORENSIC PHLEBOTOMY, INC.,

Petitioners,

vs.

DAVID SCOTT NELSON and MAURICIO BAEZ FERNANDEZ, on behalf of themselves and on behalf of others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the police violate the Fourth Amendment by requiring a person arrested on probable cause for drunk driving to take a blood test when that person has agreed or consented to an available breath or urine test, where the State's implied consent statute grants the choice of test to the arrestee.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	1
I. The Ninth Circuit's Opinion Does Not Nullify The Implied Consent Laws Of Other States.	3
II. The Ninth Circuit's Opinion Does Not Expressly Conflict With The California Supreme Court's Current Decisions.	3
III. The Ninth Circuit's Opinion Does Address A Question Left Open In *Schmerber v. California* But One Which This Court Need Not Address At This Time Since The Question Can Be Resolved By Applying The Factors Set Forth In This Court's Opinion In *Winston v. Lee.*	7
IV. The Ninth Circuit's Opinion Does Not Unnecessarily Impair Law Enforcement's Ability To Combat Drunk Driving.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Cases Cited: *Page*

Mercer v. Department of Motor Vehicles, 53 Cal. 3d 753 (1991) 4

People v. Fiscalini, 228 Cal. App. 3d. 1639 (1991) 5, 6, 7

People v. Superior Court (Hawkins), 6 Cal. 3d 757 (1972) 3, 4

People v. Trotman, 214 Cal. App. 3d 430 (1989) 4

Schmerber v. California, 384 U.S. 757 (1966) 3, 4, 5, 7

Winston v. Lee, 470 U.S. 753 (1985) 4, 5, 6, 7, 8

United States Constitution Cited:

Fourth Amendment ..... i, 2, 7, 8, 9

STATEMENT OF THE CASE

While the factual background presented by petitioners is accurate, it is not complete. Since the lawsuit was dismissed at the pleading stage, and before the size of the class and number of class members were determined, it is misleading to suggest that only two persons were forced to take a blood test by the Irvine Police Department. At this point, it will suffice to say that, according to the Complaint, hundreds or thousands of arrestees were forced to take a blood test under similar circumstances.

Also relevant but missing from the petition is California's implied consent law which provides:

> If the person is lawfully arrested for driving under the influence of an alcoholic beverage, **the person has the choice of whether the test shall be of his or her blood, breath or urine**, and the **officer shall advise the person that he or she has that choice**. If the person arrested either is incapable, or states that he or she is incapable, of completing any chosen test, the person shall submit to the person's choice of the remaining tests or test, and the officer shall advise the person that the person has that choice. (California Vehicle Code § 23157(a)(2)(A).)

This is important because it distinguishes California from most of the other states which petitioners discuss.

REASONS FOR DENYING THE WRIT

Petitioner's version of the "Question Presented" follows logically from the Ninth Circuit's opinion in this case like the "end of the world" follows from a teenager's discovery of a

pimple on prom night. In other words, as can be seen by comparing the "Question Presented" as set forth by petitioners with the version offered by respondents, petitioners have overstated the impact of the Ninth Circuit's decision. While certainly correcting some archaic California state court decisions which misapplied Fourth Amendment law to the seizure of a blood sample, the Ninth Circuit's decision does not nullify the implied consent laws in other states, directly contradict the California Supreme Court, raise a substantial question of law that this court has a compelling need to address at this time, or unnecessarily impair law enforcement.

What is missing from the petitioners' version of the "Question Presented" are the conditions and limitations the Ninth Circuit placed on its holding. First of all, the Ninth Circuit did not hold that an arrestee has a Fourth Amendment right to a test of his choice. Rather, the Ninth Circuit found a Fourth Amendment violation only in the specific situation where the arrestee agreed to take a breath or urine test, which was available, and the officer still forced him to take a blood test. (Appendix to Petition, 13a-14a.) Some of the arrestees identified in the complaint preferred to take a breath test but were afraid to express their choice to the officer. For example, one of the arrestees was told that he would be held in jail for two days if he did not agree to take a blood test. (Appendix to Petition, 4a.) It is not clear from the Ninth Circuit's decision that such arrestees would be entitled to state a claim under the Fourth Amendment.

Secondly, the Ninth Circuit held that it is unreasonable under the Fourth Amendment to compel an arrestee to take a blood test only if the arrestee has agreed to a breath or urine test "which is available and of similar evidentiary value. . . ." (Appendix to Petition, 25a.) These limitations undercut petitioners' dire predictions as set forth in greater detail below.

I.

THE NINTH CIRCUIT'S OPINION DOES NOT NULLIFY THE IMPLIED CONSENT LAWS OF OTHER STATES.

Petitioners note that some implied consent laws permit the officer to choose which of the tests to administer. The Ninth Circuit's decision does not directly invalidate such laws. The Ninth Circuit concerned itself with California, whose legislature has, through the implied consent law, deemed blood, urine and breath tests as functionally equivalent. (Appendix to Petition, 8a-9a.) There indeed might be a valid constitutional challenge to some of the implied consent laws which mandate a blood test, but the instant petition is not the proper vehicle to challenge such law and there is no factual record regarding the circumstances of those other states. Accordingly, there is no need for this court to grant certiorari because of the possible impact of the Ninth Circuit's decision on the implied consent laws of various states.

II.

THE NINTH CIRCUIT'S OPINION DOES NOT EXPRESSLY CONFLICT WITH THE CALIFORNIA SUPREME COURT'S CURRENT DECISIONS.

California state courts have misconstrued *Schmerber v. California*, 384 U.S. 757 (1966) for years. The problem started with *People v. Superior Court* (*Hawkins*), 6 Cal. 3d 757 (1972). There, the police took a suspected drunk driver to a hospital and without his consent obtained a blood sample. The California Supreme Court summarized the holding of as follows:

> It is clear that the Fourth Amendment does not bar a compulsory seizure, without a warrant, of a person's

> blood for the purposes of a blood alcohol test to determine intoxication, provided that the taking of the sample is done in a medically approved manner, **is incident to a lawful arrest**, and is based upon the reasonable belief that the person is intoxicated. (*Hawkins*, 6 Cal. 3d at p. 761 (emphasis added).)

In its most recent word on the subject, the California Supreme Court still spoke of the authority to seize a blood sample as being rooted in the "incident to arrest" exception to the warrant requirement. (*Mercer v. Department of Motor Vehicles*, 53 Cal. 3d 753, 760 (1991).)

This Court made clear in *Winston v. Lee*, 470 U.S. 753, 759 (1985), the blood test in *Schmerber* was permissible only "because the case fell within the exigent-circumstances exception to the warrant requirement." Other decisions of the California courts have recognized the mistaken reliance on the "incident to arrest" exception. For instance, in *People v. Trotman*, 214 Cal. App. 3d 430, 436 (1989), the court noted the aforementioned deficiency in *Hawkins's* analysis of *Schmerber*.

In *Winston*, the Court explained that the constitutionality of the seizure of a blood sample, like other bodily intrusions, must be subjected to a balancing test:

> The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure.

(*Id.* at p. 760.) Among the factors described by the Court in applying this balancing test were the extent and magnitude of the intrusion upon the arrestee, whether the search was more

intrusive than reasonably necessary to accomplish its goals, and the state's interest in obtaining reliable evidence that would not otherwise be available. (*Id.* at pp. 759-763.)

To date, the California Supreme Court has not addressed the *Schmerber* decision from the perspective of "exigent circumstances" nor has it engaged in the balancing test set forth in *Winston v. Lee*. Presumably, were the California Supreme Court to address the issue raised in the instant case from that perspective and apply the balancing test, it would agree with the Ninth Circuit decision.

Another California state court did reach a conclusion similar to that reached by the Ninth Circuit. In *People v. Fiscalini*, 228 Cal. App. 3d. 1639 (1991), the DUI arrestee was advised that he had to submit to a breath, urine or blood test. He chose the urine test and provided a sample. Later, the officer requested he also provide a blood sample, which the officer thought would be the most accurate test for alcohol and which could also detect the presence of drugs. After Fiscalini refused to provide a blood sample, the officer took one by force. Applying *Winston* and *Schmerber*, the court found that the seizure was unreasonable:

> [T]he People here did not demonstrate sufficient need to withdraw Fiscalini's blood without his consent after he provided a urine sample. . . . [T]he officer's opinion blood was the best test for detecting alcohol was not sufficient to show any need to take Fiscalini's blood sample after he already provided a urine sample. Under the implied consent law a person lawfully arrested for driving under the influence of alcohol has the choice of submitting to a blood, breath or urine test. Enactment of the implied consent law is tantamount to government acknowledgment a urine test is functionally

> equivalent of a blood test for evidentiary purposes. . . . **Thus, having already obtained one sample from Fiscalini with his consent, the government did not demonstrate any need to force him to undergo a second intrusion.** (*Fiscalini*, 228 Cal. App. 3d at pp. 1644-1645 (citations omitted) (emphasis added).)

The court similarly held since there was no showing the urine test would not have sufficed to determine the presence of drugs, an additional blood test was unnecessary. (*Id.* at pp. 1645-1656.)

Put another way, *Fiscalini* held that no exigent circumstances made it necessary for the officer to obtain a blood sample without a warrant since he had already obtained a perfectly acceptable urine sample. Applying the *Winston* factors, the taking of a blood sample was found to be more intrusive than necessary. *Fiscalini* also recognized that the implied consent law is significant to the question of the constitutionality of compelled blood tests:

> [T]he existence of the implied consent law bears upon the element of the government's need for the blood sample under the test articulated in *Winston v. Lee* [citation omitted]. . . .

(*Id.* at p. 1645, n.7.) That statute reflects the government's acknowledgment that a blood, breath and urine test are all functionally equivalent for purposes of determining blood alcohol level. (*Id.* at p. 1645.)

In *Fiscalini*, the court concluded that the police could not compel a DUI arrestee who had already submitted to a urine test to take a blood test, but did not decide whether the same result would apply if that person agreed to take a urine (or

breath) test but the officer made him take a blood test instead. This latter question was the one decided by the Ninth Circuit and the decision was quite consistent with that reached in *Fiscalini*.

Petitioners cite other state supreme court decisions that supposedly conflict with the Ninth Circuit's holding. These decisions can best be addressed by quoting petitioners' assertion that the other state supreme court decisions

> are indicative of the importance state legislatures and state supreme courts place on permitting the law enforcement agency to select the chemical testing option it deems appropriate for the circumstances.

(Petition, p. 12.) Notwithstanding these other states, California has not deemed it important to permit law enforcement agencies to select the chemical testing option. To the contrary, California has deemed it important that the **arrestee** be permitted to select which test to choose. The Ninth Circuit's decision is partially based upon this legislative calculation.

III.

THE NINTH CIRCUIT'S OPINION DOES ADDRESS A QUESTION LEFT OPEN IN *SCHMERBER v. CALIFORNIA* BUT ONE WHICH THIS COURT NEED NOT ADDRESS AT THIS TIME SINCE THE QUESTION CAN BE RESOLVED BY APPLYING THE FACTORS SET FORTH IN THIS COURT'S OPINION IN *WINSTON v. LEE*.

Petitioners are correct that in *Schmerber v. California*, 384 U.S. 757 (1966), this Court did leave open the question whether the Fourth Amendment required the police to respect the request

of a drunk driving arrestee to take a breath or urine test. But, it is not necessary for this Court to address the issue *Schmerber* left open because *Winston v. Lee, supra*, already adequately did so. As noted above, *Winston v. Lee* set forth the balancing test to be applied in determining the reasonableness under the Fourth Amendment of a bodily intrusion. Those factors were fairly and reasonably applied by the Ninth Circuit. (Appendix to Petition, pp. 6a-9a.) Petitioners make no effort to question the Ninth Circuit's application of the factors. For instance, petitioners do not explain why a blood test would not be more intrusive than reasonably necessary to accomplish its goals in view of the fact that an equally reliable breath test is available and the arrestee is willing to take it. Nor do petitioners explain how the state's interest in obtaining reliable evidence that would not otherwise be available is vindicated by forcing arrestees who are willing to take a breath test to take a blood test. It is indeed strange, but perhaps not surprising, that petitioners attack the Ninth Circuit's decision without even bothering to discuss *Winston v. Lee*, the most relevant recent decision of this Court.

IV.

THE NINTH CIRCUIT'S OPINION DOES NOT UNNECESSARILY IMPAIR LAW ENFORCEMENT'S ABILITY TO COMBAT DRUNK DRIVING.

When in doubt, beat the drums of war. Petitioners argue that the lower court's decision will hamstring the police in their campaign to "gather the evidence necessarily to wage the war against drunk driving." (Petition, p. 15.) Contrary to petitioners' extravagant assertions, the Ninth Circuit's decision does not place drunk driving arrestees in control of the evidence. It simply puts them "in control" of their own bodies to the extent such control can be reconciled with the society's need to gather reliable evidence of intoxication. Since California deems all three

blood alcohol tests equally reliable, the police have no need for a blood sample if they can obtain a breath or urine sample.

Petitioners fear arrestees will manipulate the system to cause delay, but there is no evidence in the record that any significant delay is caused if the arrestee chooses one test over the other. Even if one test took a little longer than the others to complete because of some unique circumstances present in a particular city, there is no evidence in the record that an arrestee would be privy to such information. Thus, petitioners' speculation that an arrestee will demand "a blood test when the officer certified to administer the test is an hour away" is ludicrous. (Petition, p. 15, n.2.) How would the arrestee know that?

Moreover, petitioners argue some agencies may "prefer" not to give certain tests for economic reasons. It is likely the government could save a lot of money if it did not need to comply with the Fourth Amendment. No doubt "rural police agencies" which would prefer not to give a blood test might also prefer not to spend valuable police man-hours gathering evidence to establish probable cause when it would be much cheaper to make an arrest without probable cause. This is not a consideration worthy of any significant weight.

Petitioners finally argue that some jurisdictions might consider the breath test to be unreliable. However, the Ninth Circuit's decision was premised on the California implied consent law which treats all three tests as equally reliable. Thus, the question whether the breath test is or is not reliable is not before the Court.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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